

STATE OF VERMONT

In re) Fair Hearing No. V-05/09-258
)
 Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Families and Children, Family Services Division, to substantiate him for risk of harm-sexual. The issue is whether the Department can show by a preponderance of evidence that the petitioner meets the criteria for substantiation for risk of harm-sexual.

The parties agree that the facts are not in dispute. The parties stipulated to the facts and documents and presented written argument.

DISCUSSION

Stipulation of Facts

The parties have entered the following Stipulation as to facts and documents. The documents are referenced in the pertinent facts.

1. Petitioner was born on April 4, 1990. He is currently 19 years old.

2. Petitioner has been diagnosed with a number of disorders, including Asperger's Disorder and Anxiety Disorder, NOS. He currently receives developmental services from Lamoille County Mental Health.

3. In September 2005, petitioner appeared in Lamoille Family Court on juvenile charges of unmanageability, due to threats of physical harm to himself and others. The Court determined that petitioner was not competent to participate in court proceedings, and placed him in the custody of the Department for Children and Families.¹ (The Disposition Report is part of the record.)

4. Petitioner was admitted to the Brattleboro Retreat on several occasions in September and October 2005 for displaying unsafe behaviors. He was subsequently placed in a therapeutic foster home.

5. Pursuant to a petition filed by the Department, petitioner was appointed a guardian from the Office of Public Guardian by the Lamoille County Probate Court on June 5, 2008. (A copy of the Lamoille Probate Court Findings of Fact, Conclusions of Law, Order and the Appointment of Guardian from June 5, 2008 are part of the record.) The

¹ The petitioner remained in the Department's custody until he was 18 years old.

guardianship was terminated by a stipulation signed by the Lamoille Family Court on January 22, 2009. (A copy of the Stipulation is part of the record.)

6. On August 28, 2008 a report of sexual abuse was entered by J.Ko., a social worker for the Department in the Morrisville office, against petitioner (Intake #71989, a copy is part of the record.) The report alleges that petitioner made telephone calls to a 12-year-old girl that were sexually threatening and sexually explicit and that he masturbated when making the calls. The report was investigated on September 9, 2008. Petitioner was not interviewed for the investigation, because his state guardian declined to consent to the interview.² At the conclusion of the investigation, a substantiation of sexual abuse was entered against petitioner based not only on the reported conduct but also on the disclosure by the victim during the course of the investigation that petitioner fondled her above the clothing on her chest, stomach and crotch. Petitioner has not appealed this substantiation.³

² Petitioner's guardian was following the policy of his office by refusing to allow the Department to interview petitioner.

³ As a result of this substantiation, petitioner's name was placed on the Department's child abuse registry.

7. After the 2008 substantiation, petitioner was told orally on several occasions by J.Ko. that he should not be in contact with children under age 16. The Department did not convey this information to petitioner in writing.

8. In December 2008 the Department office in Newport opened an investigation of an allegation of risk of sexual harm against petitioner. The investigation did not support the allegation, and no substantiation was entered. (January 20, 2009 letter to petitioner from Department is part of the record.)

9. On January 23, 2009 a report of risk of sexual harm was entered by J.Ke., a social worker for the Department in the Newport office, against petitioner (Intake # 78087 which is part of the record). The report alleges that petitioner had spent several overnight visits in a home where young children were present. The report was investigated on January 26, 2009. The investigation determined that petitioner spent several overnight visits in the home with children. The investigation determined that petitioner had never been left alone with the children. The investigation did not discover any evidence of abusive or inappropriate behavior by petitioner towards the children. Based on the investigation's finding that petitioner had been staying in a

home with children, a substantiation of risk of sexual harm was entered against petitioner on January 29, 2009. (January 29, 2009 Notice of Substantiation is part of the record.)

The investigation notes indicate that the mother of the children in question was interviewed and maintained that petitioner was never alone with the children and that she allowed him to stay there temporarily. The investigator's notes indicate that the children did not present evidence of abuse or neglect.

10. Petitioner appealed the 2009 substantiation on February 5, 2009. A Commissioner's Review of the substantiation was held on April 1, 2009. On April 28, 2009, the Commissioner's reviewer issued a report upholding the substantiation (a copy of this review is part of the record). Petitioner appealed this decision to the Human Services Board on May 6, 2009.

11. Petitioner has never been convicted to criminal charges. Petitioner has never been charged with any criminal acts of sexual misconduct.

Risk of Harm

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain

a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The pertinent sections of 33 V.S.A. § 4912 define abuse and risk of harm as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

...

(4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

(5) "A person responsible for a child's welfare" includes the child's parent; guardian; foster parent; any other adult residing in the child's home who serves in a parental role; and employee of a public or private residential home, institution, or agency; or other person responsible for a child's welfare while in a residential, educational, or child care setting, including any staff person.

...

The Department seeks to substantiate petitioner for risk of harm-sexual. Petitioner stayed overnight on several occasions with a female friend and her two minor children. Petitioner had been verbally informed by Department staff that he should stay away from children under 16 years of age.

Because he did not stay away from children and because he has a past substantiation for sexual abuse, the Department determined that the children were at risk of harm-sexual from petitioner.

However, petitioner was never alone with these children. There is no evidence that petitioner harmed these children.

Petitioner raises the question whether the Department can go forward with a risk of harm substantiation because he does not meet the definition of "a person responsible for a child's welfare" found at 33 V.S.A. § 4912(5). Petitioner is correct that he does not meet the definition because he did not reside with the children's mother nor act in a parental capacity. However, 33 V.S.A. § 4912 must be read in its entirety. In 33 V.S.A. § 4912(2), an abused or neglected child includes a child who is at "substantial risk of sexual abuse by any person."

The critical issue is whether the Department has met its burden of proof in showing that there was "a significant danger that a child will suffer serious harm" likely to cause sexual abuse. 33 V.S.A. § 4912(4).

The Board has addressed "risk of harm" in prior cases. Many Board cases turn on whether a parent's or caregiver's actions or omissions rise to the level of gross negligence.

See Fair Hearing Nos. A-08/08-384, Y-01/08-22, and A-06/08-237.

This case does not turn on whether petitioner's actions constitute gross negligence. It appears that petitioner's mere presence with the children led to the investigation and was key to the substantiation by the Department.

The Board has found that risk of harm must be predicated upon evidence showing a significant risk that a child will be seriously harmed, not on speculation. Fair Hearing Nos. Y-01/08-05 and 19,126.

Petitioner is a developmentally disabled young man with a troubled history. This alone does not rise to the evidence necessary to show that the two children in question were placed at risk of serious harm. The Petitioner was not alone with the children. There is no evidence that anything untoward happened to the children. The Department's case tends towards speculation.

The petitioner also argues that his due process rights have been violated, in part, because the Department's verbal warnings that he stay away from all children under 16 year old amount to a de facto restraining order without benefit of judicial process and because the registry is a significant penalty to which due process applies. Because this case can

be decided on statutory grounds, there is no necessity to reach the constitutional arguments.

The Department has not met their burden of proof to substantiate petitioner for risk of harm-sexual and their decision is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

ORDER

The Department's decision to substantiate petitioner for risk of harm-sexual is reversed.

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